



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MAR 23 2009

Jason Torchinsky, Esq.  
Holtzman Vogel, PLLC  
98 Alexandria Pike, Suite 53  
Warrenton, VA 20186

RE: MUR 5988  
American Future Fund

Dear Mr. Torchinsky:

On April 11, 2008, the Federal Election Commission notified your client, American Future Fund, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 25, 2009, the Commission found, on the basis of the information in the complaint, and information provided by your client, that there is no reason to believe American Future Fund violated 2 U.S.C. §§ 433 and 434. The Factual and Legal Analysis, which explains the Commission's no reason to believe finding, is enclosed for your information. The Commission also considered the other allegations in the complaint but was equally divided on whether to find reason to believe American Future Fund violated 2 U.S.C. §§ 441b(a), 434(c), 441d(a)(3), and 441d(d)(2). One or more Statements of Reasons explaining the Commission's vote will follow shortly. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact William Powers, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to be "JMcConnell", written over the typed name.

Julie K. McConnell  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENT:** American Future Fund **MUR:** 5988

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6 **I. INTRODUCTION**

7 This matter concerns allegations that the American Future Fund ("AFF"), an Iowa  
8 nonprofit corporation that has applied for tax exempt status under I.R.C. § 501(c)(4), has  
9 violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the  
10 Act"). Specifically, the complaint alleges that AFF aired a television advertisement in  
11 Minnesota containing express advocacy and, consequently, was required to register and report as  
12 a political committee with the Commission, file an independent expenditure report, and include  
13 appropriate disclaimers in the advertisement. In its response, AFF denies that the advertisement  
14 contains express advocacy and asserts that it was not required to register with the Commission as  
15 a political committee or to report the expenditures made for the advertisement.

16 As discussed further below, the available information indicates that AFF does not have  
17 federal campaign activity as its major purpose and, thus, has not triggered political committee  
18 status. Therefore, there is no reason to believe that AFF violated 2 U.S.C. §§ 433 and 434 by  
19 failing to register and report as a political committee.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. FACTUAL BACKGROUND**

**1. Organizational Structure and Purpose**

AFF is an Iowa nonprofit corporation registered with the Iowa Secretary of State. See Attachment 2, Articles of Incorporation (Aug. 7, 2007). As a nonprofit corporation, AFF has no members. See *id.*; see also Response at 7. According to its response, AFF submitted an application for recognition of tax exempt status under I.R.C. § 501(c)(4) to the Internal Revenue Service ("IRS") on March 18, 2008. See Response at 1.

It appears that AFF has only made public statements of its organizational purpose in its Articles of Incorporation and its website. AFF's Articles of Incorporation, filed on August 7, 2007 with the Iowa Secretary of the State, sets forth the organization's goal "to further the common good and general welfare of the citizens of the United States of America by educating the citizens of the United States about public policy issues." See Attachment 2, Articles of Incorporation. These goals were echoed in an April 7, 2008 press release announcing the launch of its website, where AFF President Nicole Schlinger stated: "The American Future Fund was formed as a mechanism to promote conservative, free market ideas, and to communicate them to the public. . . . Conservative and free market principles are under direct attack by liberal groups like MoveOn.org and Americans United for Change. It is imperative that there be a voice to defend these principles and articulate a vision for bolstering America's global competitiveness." See American Future Fund Website, <http://americanfuturefund.com/2008/04/07/american-future-fund-launches-website/>.

2. American Future Fund's Public Communications and Activity

On March 19, 2008, AFF began running a television advertisement titled "Independent" in the media markets of Minneapolis and Mankato. The "Independent" ad ran for approximately two weeks, *see* Complaint at 1, and during that time AFF purchased at least 178 spots on five different television stations for an amount of at least \$132,920. *See* Polinaut: Exploring the Universe of Politics, <http://minnesota.publicradio.org/collections/special/columns/polinaut/> (May 6, 2008). The ad contained a female announcer, images, and the following text:

Audio	Visual
<p><b>ANNOUNCER:</b> When the unthinkable happened, Senator Norm Coleman teamed with Amy Klobuchar to secure \$250 million to rebuild the 35W bridge. Coleman has worked with Republicans and Democrats to make college more affordable, expand opportunities for our soldiers and National Guard returning home, and crack down on predatory lenders. An independent voice for Minnesota: Norm Coleman. Call Norm Coleman and thank him for his agenda for Minnesota.</p>	<p><b>Picture:</b> Split-screen picture of 35W bridge collapse  <b>Text:</b> "When the unthinkable happened . . ."</p> <p><b>Picture:</b> Senator Coleman speaking  <b>Text:</b> "Senator Norm Coleman Teamed With Senator Amy Klobuchar"</p> <p><b>Picture:</b> Nighttime picture of 35W bridge collapse followed by animated picture of rebuilt 35W bridge  <b>Text:</b> "Secured \$250 million to rebuild 35W bridge"</p> <p><b>Picture:</b> Senator Coleman reaching out to onlookers at what appears to be a speech or convention  <b>Text:</b> "Worked with Republicans &amp; Democrats"</p> <p><b>Picture:</b> A picture of what appears to be a university followed by a picture of students walking with a college professor  <b>Text:</b> "Coleman Agenda for Minnesota Make College More Affordable"</p> <p><b>Picture:</b> A picture of a young man looking up from reading or writing, followed by a picture of four soldiers standing on top of a tank, silhouetted by a setting sun and orange-red sky  <b>Text:</b> "Coleman Agenda for Minnesota Expand opportunities for Soldiers &amp; National Guard"</p> <p><b>Picture:</b> A picture of Senator Coleman at a hearing making gestures  <b>Text:</b> "Coleman Agenda for Minnesota Crack down on predatory lenders"</p> <p><b>Picture:</b> A picture of Senator Coleman in a barn coat shaking a constituent's hand followed by a picture of Senator Coleman in a suit shaking a constituent's hand  <b>Text:</b> "An Independent Voice for Minnesota"</p> <p><b>Picture:</b> Picture of Senator Coleman on the left-hand side of the screen  <b>Text:</b> "Call Senator Norm Coleman Thank him for his agenda for Minnesota 651-645-0323 PAID FOR BY AMERICAN FUTURE FUND"</p>

On the same day that AFF began to air "Independent," Senator Coleman made a brief appearance before the Minnesota Capitol press corps to discuss the upcoming Senate race and criticize potential Democratic challenger Al Franken. Rachel E. Stassen-Berger, *Coleman Rips Franken as 'Mean, Angry': Senator Kicks Off Re-Election Campaign Saying He's the Uniter*, ST. PAUL PIONEER PRESS, Mar. 20, 2008. Although Minnesota Congressional and Senate primaries are not until September, and Senator Coleman appears to be uncontested in the Republican primary, Senator Coleman officially launched his campaign for reelection to the United States Senate on March 26, 2008, a week after AFF began airing "Independent." See *Coleman prepares to announce Senate reelection bid*, ASSOCIATED PRESS, (Mar. 26, 2008).

Although the March 19, 2008 airing of "Independent" appears to be AFF's first public communication, the group has also issued numerous press releases and communications on a variety of issues. Such items include:

- An April 16, 2008 letter supporting the Columbian Trade Protection Act that was currently pending in the Senate;
- An April 23, 2008 paid advertisement in Roll Call calling for the passage of the bipartisan FISA bill;
- An April 28, 2008 release of survey results from Louisiana that found "desperately low congressional approval ratings and growing interest in taxes and economic issues;"
- An April 28, 2008 press release calling for a "crack down" on tax evasion;
- An April 30, 2008 letter to Speaker Nancy Pelosi calling for the House to vote on the Columbian Trade Protection Act;
- A May 2, 2008 press release criticizing the Minnesota state legislature for passing the Employee Free Choice Act;
- A May 8, 2008 release of national poll results;
- A May 22, 2008 release of poll results focusing on the gas tax;

- A May 28, 2008 press release supporting a recent Wall Street Journal op-ed by Congressman Paul Ryan (R-WI) that proposes Social Security, Medicare, and Medicaid reform; and
- A May 29, 2008 press release supporting a recent American Spectator article about “entitlement” reform.

See American Future Fund Website, <http://www.americanfuturefund.com/topics/press-releases/>.

AFF has also aired several radio and television advertisements that focus on energy issues and feature sitting Members of Congress or Senators. These advertisements have focused on allowing offshore drilling, calling on Senators Reid, McConnell, and Sununu to take action on S. 3202, the Gas Price Reduction Act, as well as asking Congressman Mark Udall to vote on H.R. 6018, a similar matter pending in the House of Representatives.<sup>1</sup> See generally, American Future Fund Website, <http://americanfuturefund.com>.

## B. LEGAL ANALYSIS

### 1. Political Committee Status

The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“*MCFL*”). The Commission has long

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<sup>1</sup> The advertisement featuring Senator John Sununu also included former Governor Jeanne Shaheen who was a participant in the New Hampshire primary. For both the Udall and Sununu/Shahen television advertisements, AFF filed an FEC Form 9 and disclosed the communications under 11 C.F.R. § 114.15. Both of these advertisements ran within 30 days of the candidates’ respective primaries, which was August 12, 2008 for the Colorado primary and September 9, 2008 for New Hampshire primary.

1 applied the Court's major purpose test in determining whether an organization is a "political  
2 committee" under the Act, and it interprets that test as limited to organizations whose major  
3 purpose is federal campaign activity. *See* Political Committee Status: Supplemental Explanation  
4 and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007).

5 An organization's "major purpose" may be established through public statements of its  
6 purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (court found  
7 organization evidenced its "major purpose" through its own materials which stated the  
8 organization's goal of supporting the election of Republican Party candidates for federal office  
9 and through efforts to get prospective donors to consider supporting federal candidates); *FEC v.*  
10 *GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("organization's [major] purpose may be  
11 evidenced by its public statements of its purpose or by other means. . . ."). An organization also  
12 can satisfy *Buckley's* "major purpose" test through sufficient spending on campaign activity.  
13 *MCFL*, 479 U.S. at 262-264 (political committee status would be conferred on MCFL if its  
14 independent spending were to become so extensive that the group's major purpose may be  
15 regarded as campaign activity).<sup>2</sup>

16 Publicly available information suggests that AFF's major purpose may not be federal  
17 campaign activity. AFF's only publicly stated purpose is "to promote conservative, free market  
18 ideas." *See* American Future Fund Website, [http://americanfuturefund](http://americanfuturefund.com/2008/04/07/american-future-fund-launches-website)  
19 [.com/2008/04/07/american-future-fund-launches-website](http://americanfuturefund.com/2008/04/07/american-future-fund-launches-website); *see also* Attachment 2, Articles of  
20 Incorporation. Moreover, neither the officers nor directors of AFF have made any statements to  
21 the press indicating that the organization's purpose is to influence federal elections.

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<sup>2</sup> The Commission has consistently applied this standard in past matters. *See* MUR 5540 (The Media Fund), MUR 5542 (Texans for Truth), and MURs 5577/5620 (National Association of Realtors – 527 Fund); *see also* Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. at 5601-02.

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1           Additionally, information regarding AFF's spending on federal campaign activity is not  
2 publicly available because, as an applicant for 501(c)(4) status with the IRS, its financial records  
3 are not available for public inspection. Although AFF's financial records are not public, the  
4 organization has engaged in a wide range of activities that are not directly related to federal  
5 campaign activity, including supporting the bipartisan FISA bill and Columbian Trade Protection  
6 Act, as well as engaging in polling on issues such as entitlement reform and the gas tax. *See Part*  
7 *II.A.2., supra*. AFF's involvement in these activities, combined with the fact that "Independent"  
8 is the only public communication by AFF that allegedly supports or opposes a federal  
9 candidate,<sup>3</sup> suggests that AFF's major purpose is not federal campaign activity. Although AFF  
10 has aired several advertisements featuring legislative issues in states with tightly contested  
11 Senate races, *see Part II.A.2., supra*, this conduct does not appear to tip the balance in favor of  
12 concluding that AFF's major purpose is federal campaign activity based on the other facts  
13 available at this time.

14           Therefore, there is no reason to believe that American Future Fund violated 2 U.S.C.  
15 §§ 433 and 434 by failing to register and report as a political committee.

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<sup>3</sup>       The AFF website is a joint website between American Future Fund and American Future Fund Political Action ("AFF PA"), which is a political committee that registered with the Commission on May 7, 2008. AFF PA has produced Internet videos that are critical of several federal candidates. In particular, AFF PA has produced Internet videos that have criticized Al Franken for his past business dealings, called on Senator Barack Obama to fire a controversial figure from his campaign staff, and accused Senator Mary Landrieu of being involved in corruption. *See* <http://americanfuturefund.com/author/aff-political-action/>. Despite these Internet videos by AFF PA, the "Independent" advertisement appears to be the only communication that AFF has produced that allegedly supports or opposes a federal candidate.